

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SINGULAR COMPUTING LLC,)
)
Plaintiff,)
) No. 1:19-CV-12551
vs.)
)
GOOGLE LLC,)
Defendant.)

Before the Honorable F. Dennis Saylor, IV,
United States District Court Judge Hearing via
videoconference held on Wednesday, October 19, 2022.

APPEARANCES:

For the Plaintiff:

Prince Lobel Tye LLP, Paul J. Hayes, One
International Place, Suite 3700, Boston, Massachusetts 02110.

For the Defendant:

Paul Hastings LLP, Matthias A. Kamber, 101
California Street, Ste 48th Floor, San Francisco, California
94111.

Keker, Van Nest & Peters LLP, Robert A. Van Nest,
Vishesh Narayen, and Anna Porto, 633 Battery Street, San
Francisco, California 94111.

Kwun Bhansali Lazarus LLP, Asim M. Bhansali, 555
Montgomery Street, Suite 750, San Francisco, California
94111.

Leigh B. Gershowitz, RMR, CRR
Official Federal Court Reporter
United States Courthouse
300 State Street, Room 303D
Springfield, Massachusetts 01105

P R O C E E D I N G S

(Hearing commenced at 2:10 p.m.)

THE CLERK: Court is now in session in the matter of Singular Computing LLC vs Google LLC, Civil Action Number 19-12551. Participants are reminded that photograph and recording and rebroadcasting of this hearing is prohibited and may result in sanction.

Would counsel please identify themselves for the record, starting with the plaintiff.

ATTORNEY HAYES: Paul Hayes for the plaintiff.

THE COURT: Good afternoon.

ATTORNEY VAN NEST: Bob Van Nest -- go ahead, Nathan.

ATTORNEY SPEED: This is Nathan Speed with Wolf, Greenfield and Sacks on behalf of Google. Go ahead, Bob, if you want to introduce yourself.

ATTORNEY VAN NEST: Bob Van Nest, your Honor. Good afternoon. I'm here with Matthias Kamber, Asim Bhansali, Anna Porto, and Vishesh Narayan. Good afternoon. And Mr. Speed, of course.

THE COURT: Good afternoon.

All right. This is a status conference in this case. I have both parties have requested a conference and raise different issues and I have three motions pending. I'm not sure how to dig into this. Why don't I start by giving

1 both counsel a chance to give their perspective on where we
2 are and where we ought to go from here.

3 Mr. Hayes, I'll start with you.

4 ATTORNEY HAYES: Yes, your Honor. We requested this
5 status conference simply to move the case along. And as I'm
6 sure you're well aware of the claims at issue and two of the
7 patents have been held valid by the patent office. All fact
8 discovery is done. And the only thing left now is the expert
9 filings of the expert reports and the depositions. And what
10 we suggest as the reason for the call is we would ask the
11 Court to order that all deposition, expert depositions be
12 filed or exchanged by November 15, that reply expert reports
13 be December 15th, another 30 days, and that all depositions
14 of the experts be done by January 15th.

15 And we've requested that in hopes that around end of
16 February, March, we can have a pretrial and dispose of the
17 case. That is the only -- as you know, Judge, this thing has
18 been on the docket now -- it will be soon going over three
19 years and we're already delayed it a year, et cetera. So I
20 think it is imperative that we get to trial.

21 So I mean, that is basically -- the three motions
22 are the motions -- we've briefed them on the papers. And,
23 you know, we were so -- we're not going to argue the motions.
24 But in any event, there's three of them. The three motions
25 are relatively simple. The plaintiff -- the defendant wants

1 to add willful infringement. We've briefed that.

2 Inequitable conduct, I'm sorry. And we've briefed that. We
3 don't argue any more than the papers other than it is late.

4 And then we wanted to add -- amend -- amend a
5 contention simply to cite through some source code. And they
6 wanted to amend -- to add some additional validity, slash,
7 noninfringement arguments, all of which are fairly complex
8 arguments, et cetera, they're all briefed. So we're happy to
9 just let that ride on the papers. And what we're concerned
10 mostly about, I mean, frankly, is to get this to trial.

11 Now, in that sense, we know with regard to the third
12 patent in suit, which is this 961 patent, last time we had a
13 hearing, I indicated we'd give them a covenant not to sue
14 because we're not intending to go up the hill on a patent
15 that the patent office has already found invalid. So I sent
16 over a covenant not to sue and I assume that we could work
17 out the language for the covenant not to sue and dispose of
18 that one.

19 And then with respect to the second patent suit that
20 is on file for now at least six months or so, nothing has
21 been done. And my suggestion on that is we can either stay
22 it, pending a resolution of this trial, or we can dismiss it
23 without prejudice, so long as they agree that they won't run
24 off to the Northern District of California and DJ me.

25 But that all said, I think that will put the case in

1 a condition to be tried and get it over with. Because I
2 mean, frankly, we're not going to get anywhere until we get a
3 verdict given the circumstances here.

4 THE COURT: All right. A couple of questions.
5 Don't I need to build in a timetable as well for summary
6 judgment motions?

7 ATTORNEY HAYES: Yes. Yes, you do, your Honor.
8 That's why, if January 15th is like -- once of the -- once
9 all of the deps are taken, or the experts by January 15th,
10 then, obviously, between then and March, which is two months,
11 if we had a trial in March, they could file whatever summary
12 judgments and whatever. I just don't want it to spread out
13 to the summer and then blahh, blahh, and then the 12th of
14 never never comes. So --

15 THE COURT: All right. And explain to me because I
16 don't think I have a good handle on the PTAB appeal, how does
17 all of that affect what we are doing here?

18 ATTORNEY HAYES: Well, they have appealed the
19 decision and we have too and that will be briefed. And
20 the -- that -- there will be a decision in the PTAB. But
21 that -- that could be a year from now by the time the Federal
22 Circuit ends up with reply briefs and brief, arguments, and
23 whatever. Sometimes it could be 18 months. So I know my
24 Brother would love just to stay this another 18 months until
25 the 12th of never.

1 And by the -- I think the best circumstance is we
2 get a verdict. Once we get a verdict, then if we want to
3 talk on appeal, take the whole thing up to appellate court
4 and be done with it. But we need to get this thing to trial,
5 as we see it. Otherwise it is just another -- another year's
6 worth of delay, which, you know, and -- this is a delay. And
7 this is not a circumstance where they won in the lower
8 tribunal, the patent office. They lost. So, you know --

9 And with respect to the third patent that is going
10 to -- that is irrelevant to them simply because we are going
11 to give them a covenant not to sue on it. So I think that
12 the only -- the concept of this appeal thing is just to delay
13 it another year, year and a half, which I think is just
14 a -- it is not fair to the plaintiff in this circumstance at
15 all, in my view and argument would be to you.

16 THE COURT: All right. And if I were to try to
17 block off a time for a trial, how -- it is kind of an
18 abstract question to me at this time -- how long do you think
19 I would need to block off?

20 ATTORNEY HAYES: I think the maximum time would be
21 10 trial dates. And probably if you put us on a clock, it
22 could -- it could get down to eight. You know, it is -- it
23 is not -- this is not *IBM v Xerox* type of case. It is a
24 fairly straightforward patent case. So I can't imagine it
25 taking more than ten days, like any other patent case I've

1 been involved in.

2 THE COURT: All right. Who is going to take the
3 lead for Google responding to all of that?

4 ATTORNEY VAN NEST: Mr. Kamber is going to do that,
5 your Honor.

6 ATTORNEY KAMBER: I'm happy to do that, your Honor.
7 Matthias Kamber on behalf of Google. Hopefully you can hear
8 me okay.

9 THE COURT: Yes.

10 ATTORNEY KAMBER: Let me take some of those issues
11 that Mr. Hayes raised in order. With respect to the covenant
12 not to sue, we did receive that yesterday. That was
13 something that we talked about back in May, the first track
14 we saw was yesterday. We still are evaluating that. I think
15 Mr. Hayes is right that we'll have to work out some of the
16 language of that covenant. But we now have someplace to
17 start from. And we'll try to resolve that in -- soon. We
18 just hadn't had a chance to discuss it even with our client
19 yet, so.

20 With respect to the second case, that's -- I think
21 Mr. Hayes said at the last conference as well that they were
22 willing to dismiss that with prejudice.

23 THE COURT: Without --

24 ATTORNEY KAMBER: Haven't done so yet --

25 THE COURT: I thought he said without prejudice.

1 ATTORNEY KAMBER: Dismiss it without prejudice, yes.
2 Yes. I'm sorry. I may have misspoken. So dismiss without
3 prejudice.

4 And, you know, some of this discussion I think is
5 hypothetical unless and until they do that. I hear that
6 they're willing to do that, but if they don't do that,
7 managing the schedule and the trial becomes altogether I
8 think a different question.

9 THE COURT: Well, that is a little more complicated,
10 as he said, which I think is fair. He doesn't want to
11 dismiss it without prejudice and then have a suit filed the
12 next day in the Northern District of California and he's lost
13 his venue. Should I just stay it? And what does the
14 dismissal accomplish that a stay would not? Other than --

15 MR. VAN NEST: Your Honor, we'd agree not to DJ it.
16 We'd agree not to DJ it on behalf of Google. I'd like to
17 have -- we'd like to have it dismissed without prejudice as
18 soon as possible. And we don't plan to file a DJ on that
19 second case.

20 THE COURT: All right. On that piece of it, then,
21 why don't you talk to one another and see if you can agree on
22 a proposal going forward and, you know, we'll take it from
23 there.

24 Okay, Mr. Kamber?

25 ATTORNEY KAMBER: That would be fine, your Honor. I

1 think we might be able to wrap that in to the covenant
2 discussion as well and perhaps do it all in one fell swoop.
3 So with respect to the appeal, I just want to correct a few
4 things from Mr. Hayes. He says two of the patents have been
5 found valid and that we lost at the PTAB. The reason they're
6 appealing is because that's just plain incorrect. Dozens of
7 the claims were invalidated. Four -- there are four asserted
8 claims in this case. Two of those asserted claims were
9 invalidated. Two of them are still pending. Two of them
10 still remain following those PTAB proceedings.

11 So what's happening now is there is a cross appeal.
12 At the last status conference, Singular did not yet have a
13 position as to whether it was planning to appeal. They now
14 have appealed. And to put it simply, they're advocating for
15 a claim construction at the Federal Circuit that would
16 crystallize one of Google's noninfringement defenses based on
17 some admissions in the testimony at -- by their expert before
18 the PTAB.

19 So, again, that's -- that's -- this cross appeal,
20 their brief is now due by agreement of the parties, that is
21 Singular's brief is due in December. And the briefing will
22 not be complete at the Federal Circuit until -- I think it is
23 February 22nd of next year, absent them asking for additional
24 extensions. So we're looking I think at an argument that
25 would be sometime in the summer, June, July, or August, is

1 based on the current Federal Circuit sort of schedule, that
2 would be taking place.

3 And to be clear, Singular shouldn't be moving
4 forward with a trial when they're the ones who are in
5 parallel advocating for a claim construction that is
6 different than the one that exists before the Federal
7 Circuit. That is not true with respect to Google. But it is
8 true that they, Singular, are advocating for a claim
9 construction that is different than the one that is pending.

10 So the construction would impact, for what it is
11 worth, both of the remaining asserted claims in this case,
12 from the 273 and the 156 patent respectively. And it would
13 be a waste of everyone's resources, I think, including the
14 Court's of course, to go ahead with the trial only to have
15 the appeal result in a different claim construction. So we
16 do take issue with this idea of barreling ahead and then
17 just simply taking it up to the Federal Circuit, which is
18 already hearing one of -- one of these issues and is on track
19 to do so by next summer.

20 And it is true. Mr. Hayes is right, we don't know
21 when any decision would issue. But I recently heard Chief
22 Judge Moore of the Federal Circuit at their judicial
23 conference explain the decisions, I think, on average are
24 coming out about a month or two after oral argument.

25 So let me turn now to the schedule and what

1 Mr. Hayes has proposed. I think there are some practical
2 problems with that. And by the way, we're not advocating for
3 a stay. We haven't asked for a stay. We think that this
4 case should be proceeding in parallel with the Federal
5 Circuit appeal in terms of expert discovery and other things.
6 But we also, I think, need to be realistic about what that
7 has to look like. And I think we need this covenant resolved
8 and the pending motions resolved before we really understand
9 the scope of expert discovery.

10 I think we'd be fine without a hearing as well, your
11 Honor. But if you would prefer a hearing once you look at
12 those motions or perhaps you know now whether you want a
13 hearing, we would be happy to set one and then have those
14 issues resolved. I think that then sets us up for expert
15 discovery. I think we were -- we were contemplating
16 something along the lines of the following: To have opening
17 expert reports be due right before the holidays. For
18 example, December 21st or thereabouts. Having then
19 responsive reports be due February 1st. That builds in a
20 little extra than the 30 days, then, that Singular
21 contemplates, but it also, I think, takes into account that
22 we'll all lose a week to ten days of time over the holidays
23 as well. And then that expert depositions be complete by the
24 1st of March. So I think that would build in time to resolve
25 these other issues on the front end of expert discovery and

1 allow that to proceed at a pace.

2 And you also raised, your Honor, this issue about
3 motions. We do anticipate there will be *Daubert* motions in
4 this case. In particular, we think that there might actually
5 be a heavy *Daubert* burden because there's a relatively novel
6 damages theory, I think, in the works based on what we've
7 learned through discovery already. So the schedule should
8 account for that. And we also expect to file for summary
9 judgment.

10 So we don't know if the Court has a preference for
11 doing *Daubert* and dispositive motions at the same time. I've
12 seen one schedule of yours, your Honor, where the *Daubert*
13 was, I think, scheduled and the briefing was done a month
14 prior. I think that was the *Fitbit* case a year or two ago.
15 So we defer to your preference there with respect to the
16 briefing. But if you wanted it staggered, we would propose
17 that *Daubert* briefing be on or about the end of March and
18 then summary judgment on or about the end of April, maybe a
19 month later. Perhaps the Court wants more time than that to
20 resolve the *Daubert* motions. But, again, we defer to you on
21 your schedule and what your preference is in terms of the
22 amount of time you would have with it. And like the
23 *Dauberts*, we anticipate that the summary judgment motions
24 will be important here. So we do anticipate filing some when
25 the time comes.

1 So, again, work -- just to sum it up, working
2 forwards from today, we see expert discovery getting
3 underway, once the scope is resolved, that would be late this
4 year. *Dauberts* and summary judgment to be dealt with
5 basically next spring. And this all happening in parallel to
6 Singular's cross appeal. And then it is a matter of, I
7 think, finding a trial date at a reasonable point. And I
8 think that's where schedules may get complicated, depending
9 on your own schedule. Mr. Van Nest I know has a number of
10 trials scheduled for next fall, I think four back-to-back
11 trials that he can address and explain to the extent that
12 that is a time period that we might be looking at.

13 But that's the schedule, your Honor, that we would
14 propose. I think it is very much in line with the way that
15 your Honor contemplated this when we last spoke, which was --
16 I think you said, I think setting it the better part of a
17 year in advance is the better way to go. And we agreed with
18 that, in light of everything that needs to be done by the
19 parties and the Court between now and trial.

20 THE COURT: And what is -- again, it is an abstract
21 question because we don't quite know what this is going to
22 look like -- but what is your best guess, as you sit here,
23 for the length of the trial?

24 ATTORNEY KAMBER: I think Mr. Hayes is probably
25 right, that we're looking at two weeks at the outside. I

1 would like to think that perhaps it could be a little
2 shorter. But I think fundamentally we agree that it would
3 be -- it is more than a week. This case will take more than
4 a week to try. And I invite Mr. Van Nest to say otherwise if
5 he thinks so. But I think eight to ten days sounds about
6 right to us.

7 ATTORNEY VAN NEST: I think that is right, your
8 Honor, depending on scope. But I think it will be a good
9 solid ten days with jury selection, openings, closings, and
10 witness testimony. So I wouldn't estimate anything shorter
11 than ten.

12 THE COURT: All right. All right. In no particular
13 order what I'm going to do is I'm going to rule on two of the
14 motions because I don't want to catch you flat-footed. I
15 want to set up a Zoom conference, I don't know, a week to ten
16 days out to talk about the third. I'm not sure I quite
17 understand it and I think oral argument would be helpful as
18 to that.

19 I'm going to set a timetable for expert disclosures
20 and depositions and dispositive motions and, I suppose,
21 *Daubert* motions. And I think what makes sense is to -- me to
22 get back on track with frequent, reasonably frequent, status
23 conferences to try to stay on top of things. I'm not quite
24 ready to set a trial date, although I do think we need to
25 block that time off well in advance. And jumping ahead a

1 little bit, what I'm going to do is I'm going to set this for
2 a further status in -- somewhere 30 to 45 days. And at that
3 conference, I will ask you in advance of the conference to
4 indicate the weeks in which you would know you are
5 unavailable. I guess to be safe, we should do it for really
6 up until next October 1st. Let's say that. July and August
7 are difficult, as you know, for a trial that exceeds more
8 than a week. It is hard to get jurors. But I'm not going to
9 rule that out. And, obviously, all of you are going to have
10 different vacation schedules, lots of other things going on
11 in your lives in addition to your trial dates. But I think I
12 need to start working with at least the obvious conflicts
13 that you know you have over the next year or so so we can try
14 to identify a two-week period of time and block it off. Even
15 if I wind up postponing that for some reason, at least we
16 have a target. I'm not going to be able to turn on a dime on
17 this. I can't and you can't. So let's at least see if we
18 can identify those periods and work with that.

19 That trial date may be sooner, perhaps, than the
20 defense wants, if that is what works out best. And you'll
21 have to live with that. And it may be later than the
22 plaintiff wants, conversely, and they'll have to live with
23 that. The one thing I can promise, this is going to be less
24 than perfect, all right, in terms of scheduling, you know,
25 all of the things that need to be done pretrial and so on.

1 Just do the best we can.

2 So let me start by addressing two of the three
3 motions. And I'm just going to do this in summary form. I
4 have read the pleadings and I'm reasonably competent that I
5 understand them. The oldest pending motion is number 336,
6 which is Google's motion for leave to file an amended answer
7 and affirmative defenses that essentially arise from the
8 contention that discovery revealed inequitable conduct.
9 Based on my review of the papers, I'm going to deny that
10 motion based on a combination of undue delay, undue prejudice
11 and futility, largely for the reasons indicated by Singular
12 in its opposition. I am limiting that ruling to the matter
13 raised in the motion that is the -- effectively the
14 affirmative defense of inequitable conduct.

15 As to 355, which is Singular's motion for leave to
16 file supplemental infringement contentions, which essentially
17 concern what Singular says arises out of -- what it says was
18 the delayed production of source code and supplemental
19 contentions arising out of that, Google contends there has
20 been undue delay and a lack of identification of the precise
21 nature of the infringement, which I am sympathetic to, but
22 I'm going to grant the motion, that is grant 355, and permit
23 the supplemental infringement contentions as requested by
24 Singular.

25 And what I want argument on is number 359, which is

1 Google's motion for leave to supplement their noninfringement
2 contentions and invalidity contentions and particularly this
3 issue of are they improperly raising prior art in violation
4 of the statutory estoppel bar and so on. I'm not sure I
5 quite understand these issues well enough to rule on them.
6 And I think some argument would be helpful.

7 And we may as well set that time before too much
8 time goes by. I was supposed to be on trial next week and
9 one of the lawyers got COVID, so I have lots of free
10 mornings. But I know some of you are in California. Let's
11 see. How about Tuesday the 25th at 2:00 in the afternoon
12 work for a Zoom hearing on that motion?

13 ATTORNEY HAYES: Fine with me, Judge.

14 ATTORNEY BHANSALI: Your Honor, this Asim Bhansali
15 for Google. Let me check my calendar real fast. I think
16 that works but let me make sure.

17 THE COURT: Again I have every morning free that
18 week, but I don't want to make --

19 ATTORNEY BHANSALI: Actually, the mornings would be
20 okay too, but the 25th at 11:00 -- did you say 2:00 p.m.
21 Eastern, right?

22 THE COURT: 2:00 p.m. Eastern.

23 ATTORNEY BHANSALI: Yeah, that works for me.

24 THE COURT: Okay. Why don't we make it 1:30 Eastern
25 just to -- I've got a 3 o'clock. Just in case somehow I get

1 embroiled in this so that -- all right. So that will be a
2 hearing on that.

3 And then in terms of the schedule going forward,
4 obviously, there's some level of arbitrariness to this, but I
5 just think I need to do this to get matters on track. So I'm
6 going to direct that initial expert reports be filed by
7 December the 1st, that responsive expert reports -- I could
8 prank you and make those due January the 1st, but I think I
9 won't be quite so unkind. Let's make those January the 13th.

10 MR. VAN NEST: Thank you, your Honor.

11 THE COURT: And expert depositions, which you
12 probably ought to start working on the scheduling of those
13 now, should be completed by February the 17th. And I'm going
14 to combine the *Daubert* and summary judgment motion deadline
15 and we'll make that March the 17th. And I will set this for
16 a further status -- let's see -- how about the -- the stub
17 week before Thanksgiving, Tuesday, the 22nd at 4:00 Eastern.

18 MR. VAN NEST: That would be a Zoom call, your
19 Honor?

20 THE COURT: Yeah. And we may not have much to talk
21 about but I want to get back on track with checking in
22 periodically.

23 MR. VAN NEST: That is okay.

24 ATTORNEY HAYES: That is fine with us, Judge.

25 ATTORNEY KAMBER: Your Honor, one issue.

1 THE COURT: Yes.

2 ATTORNEY KAMBER: I'm sure that other counsel can
3 help with that. I might not be able to join that day because
4 of Thanksgiving travel the 26th.

5 THE COURT: Which is fine. I don't -- this is a
6 status, probably a pretty unimportant one in the scheme of
7 things, not much will have happened by then probably. But I
8 just -- I want to get back on track with checking in.

9 MR. VAN NEST: We'll be able to cover it, your
10 Honor. On Tuesday the 22nd at 1:00 Pacific.

11 THE COURT: Yes, 4:00 Eastern. And I'm going to
12 order that nobody change their Thanksgiving travel. It is
13 just not that important.

14 ATTORNEY KAMBER: Thank you.

15 THE COURT: I should actually -- maybe if I can keep
16 anybody off the roads on the east coast that might be a good
17 idea.

18 MR. VAN NEST: I'm in California too.

19 ATTORNEY HAYES: Judge, so long as we can eat turkey
20 as opposed to spam, we're all set.

21 THE COURT: All right. Here we have the horrendous
22 Boston to New York travel, which is soul deadening. Although
23 I've heard that Tuesday is the new Wednesday and that if you
24 leave Wednesday at 5:00, there's no traffic at all, which is
25 counterintuitive to say the least.

1 ATTORNEY KAMBER: I think that is probably true.

2 THE COURT: All right. So that's the tentative
3 schedule. And in terms of giving me your trial black out
4 dates so to speak, let's make that April 1st through October
5 1st. And it is just -- it may be only the beginning of a
6 conversation, but I think we need to start doing that to get
7 that time blocked off. All right?

8 ATTORNEY HAYES: Thank you, judge.

9 THE COURT: I will try to be reasonable going
10 forward in terms of deadlines. But, you know, let's -- let's
11 try to move this thing forward, okay?

12 ATTORNEY HAYES: Thank you, Judge.

13 MR. VAN NEST: Thank you, your Honor. See you next
14 Tuesday.

15 THE COURT: Anything else?

16 ATTORNEY HAYES: That's it. Have a good one.

17 THE COURT: Okay. All right. Thank you.

18 (Whereupon, the proceedings were concluded at 2:41 p.m.).
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1 CERTIFICATE OF OFFICIAL REPORTER
2
3

4 I, Leigh B. Gershowitz, Registered Merit
5 Reporter and Certified Realtime Reporter, in and for the
6 United States District Court for the District of
7 Massachusetts, do hereby certify that the foregoing
8 transcript is a true and correct transcript of the
9 stenographically-reported proceedings held in the
10 above-entitled matter, to the best of my knowledge and
11 ability.
12
13

14 /s/ Leigh B. Gershowitz

15 Leigh B. Gershowitz, RMR, CRR
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